Calendar No. 348

99TH CONGRESS
1st Session

SENATE

REPORT
99-159

FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT

OCTOBER 17, (legislative day, OCTOBER 15), 1985.—Ordered to be printed

Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 1570]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended to pass.

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I. COMMITTEE AMENDMENT AS REPORTED

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Fair Labor Standards Public Employee Overtime Compensation Act".

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S543-15

SEC. 2. Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end thereof the following new subsection:

"(o)(1) Employees of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency may receive overtime compensation in the form of compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by subsection (a) of this section pursuant to—

"(A) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees; or

"(B) in the case of employees not covered by clause (A), an agreement or understanding arrived at between the employer and employee before the performance of the work.

"(2) In the case of employees described in clause (B) of paragraph (1) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (B).

"(3) In determining eligibility for overtime compensation under this section, compensatory time off taken during any workweek or work period shall not be counted as hours worked during that workweek or work period.

"(4)(A) No overtime compensation in the form of compensatory time off may be accrued by any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, in excess of 480 hours for hours worked after April 15, 1986.

"(B) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, receive overtime compensation in accordance with subsection (a) of this section.

"(C) If any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency terminates employment with a particular public agency, the employee shall receive overtime compensation in accordance with the provisions of subsection (a) of this section.

"(D) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who—

"(i) has accrued compensatory time off, and

"(ii) has requested the use of such compensatory time off,

shall be permitted to use such compensatory time off within a reasonable period after the request, if the use of such compensatory time off does not unduly disrupt the operations of the public agency.

"(E) In making a determination under subparagraph (B) or (C) of this paragraph, the rate of compensation of the employee shall be the rate of compensation earned by the employee at the time the employee receives compensation for overtime.".

SEC. 3. Section 7 of the Fair Labor Standards Act of 1938 (as amended by section 2) is amended by adding at the end thereof the following new subsection:

"(p) In determining the hours of employment to which the rate prescribed by subsection (a) of this section applies, the hours worked by an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may be excluded by the agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section if—

"(1) the hours worked are solely at the employee's option; and

"(2) the hours are worked—

"(A) on an occasional or sporadic part-time basis for such public agency in a different capacity from the capacity in which the employee is primarily employed;

"(B) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), on a special detail for a separate and independent employer, if the public agency by whom the employee is employed requires that its fire protection or law enforcement personnel be hired by the separate and independent employer for the work, otherwise facilitates the employment, or affects the condition of employment of employees of the separate and independent employer; or

"(C) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), for another employee who was scheduled to work such hours if the employee's have agreed, with the approval of the employer, to substitute scheduled work hours.".

SEC. 4. Section 3(e) of the Fair Labor Standards Act of 1938 is amended—

(1) by striking out "paragraphs (2) and (3)" in paragraph (1) and by inserting in lieu thereof "paragraphs (2), (3), and (4)"; and

(2) by adding at the end thereof the following new paragraph:

"(4)(A) The term 'employee' does not include any individual who is a volunteer for a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, even if the individual is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, except that an individual who is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services is not a volunteer for the purpose of this paragraph.

"(B) The hours in which an employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency performs services on a volunteer basis for a public agency, other than the public agency which is the employee's employer, shall not be considered hours worked for the principal public agency for purposes of sections 6, 7, and 11 of this Act, even if the principal public agency has an agreement for mutual aid with the agency for which the employee volunteers.".

SEC. 5. Section 3(e)(2)(C)(ii) of the Fair Labor Standards Act of 1938 is amended—

(1) by striking out "or" at the end of division (III);

(2) by striking out "who" in division (IV);

(3) by striking out the period at the end of division (IV) and inserting in lieu thereof a comma and the word "or"; and

(4) by adding at the end thereof the following:

"(V) is an employee of the legislative branch or legislative body of a State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.".

SEC. 6. Notwithstanding the provisions of section 8, an employee of a public agency who asserts rights under the Fair Labor Standards Act of 1938 between February 19, 1985, and April 14, 1986, shall be accorded the same protection against discharge or discrimination as is available under section 15(a)(3) of the Fair Labor Standards Act of 1938.

SEC. 7. (a) The Secretary of Labor shall promulgate regulations to carry out paragraph (4) of section 3(e) of the Fair Labaor Standards Act of 1938, as added by section 4 of this Act, by March 15, 1986.

(b) Prior to April 15, 1986, the practice of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency with respect to the definition of volunteers shall, for the purpose of the amendment made by section 4 of this Act, be controlling.

SEC. 8. (a) Except as provided in subsections (b) and (c) of this section, the amendments made by this Act shall take effect on April 15, 1986.

(b)(1)(A) There shall be no liability under section 16 of the Fair Labor Standards Act of 1938 for any violation arising under sections 7 or 11(c) (as it relates to section 7) of the Fair Labor Standards Act of 1938 occurring prior to April 15, 1986, with respect to any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who would not have been covered by such Act under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions of States on January 1, 1985.

(B) With respect to any employee described in subparagraph (A) of this paragraph a public agency may defer until August 1, 1986 the payment of overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for overtime hours worked after April 14, 1986.

(2) This Act and the amendments made by this Act shall not affect whether a public agency that is a State, a political subdivision of a State, or an interstate governmental agency is liable under section 16 for a violation of section 6, 7, or 11 of the Fair Labor Standards Act of 1938 occurring prior to April 15, 1986 with respect to any employee of such public agency who would have been covered by the Fair Labor Standards Act of 1938 under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions of States on January 1, 1985.

(3) The amendments made by section 2 of this Act shall apply to any collective bargaining agreement, memorandum of understanding, or other agreement between the public agency and recognized representative of such employees in effect on the date of enactment of this Act.

(c) The provisions of sections 6 and 7 shall take effect on the date of enactment of this Act.

Amend the title so as to read:

A bill to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes.

II. Summary of the Bill

I. The overtime provisions of the FLSA are modified to make comp time available in lieu of overtime pay for employees of state and local governments.

A. The bill allows employees the opportunity to receive overtime compensation in either of two forms.

B. The bill also allows employers the flexibility to negotiate for a comp time option.

C. The availability of this comp time is subject to certain conditions.

1. Comp time must be pursuant to an agreement between the employer and employee.

2. Comp time must be available at the premium rate of not less than 1½ hours for each hour of overtime worked.

3. An employee may bank up to 480 hours of comp time (i.e. 8 weeks—320 hours—of overtime worked).

4. An employee may use comp time within a reasonable period of requesting its use, so long as the employer's operation is not unduly disrupted.

5. An employee has the right to cash out comp time when leaving his or her job, at the rate of pay received when leaving.

II. The bill provides flexibility for public employers and employees in other areas.

A. Volunteers. A volunteer may receive a nominal fee or reasonable benefit without becoming a paid "employee".

B. Joint Employment. Employees may moonlight on special detail assignments (e.g. police working security at local rock concert) or occasional jobs (e.g. school bus driver refereeing school football games) without having hours counted toward overtime requirements.

III. Effective date: The bill is effective on April 15, 1986 (one year from the mandate in *Garcia*). This deferral enables state and local governments to achieve compliance.

III. Background and Need for Legislation

A. BACKGROUND

Congress enacted the Fair Labor Standards Act (FLSA) in 1938, establishing nationwide minimum wage and maximum hours standards for the first time. The FLSA proclaimed Congress' intent to ensure "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Over the years, the Act has been amended and expanded to include coverage of previously excluded groups of workers. The history of the FLSA as applied to state and local government employees involves a number of actions by Congress, the U.S. Department of Labor (DOL), and the U.S. Supreme Court since 1966.

Congressional action

The FLSA provides as a general matter that an employee who is not otherwise exempt from coverage shall be entitled to a federally prescribed minimum wage and to overtime pay on a time-and-one-half basis for all hours worked in excess of 40 in a workweek. It initially applied only to private employers who were directly engaged in commerce. In 1966, Congress extended the FLSA to cover certain school, hospital, nursing home, and transit employees of state and local government under the Fair Labor Standards Amendments of 1966 (80 Stat. 830). In 1974, Congress further expanded the FLSA to cover all state and local government employees except for a small number who were specifically exempted, when it enacted the Fair Labor Standards Amendments of 1974 (88 Stat. 55). The 1974 amendments also extended coverage of the FLSA to a wide range of Federal employees, including civilian employees of the military departments, employees of agencies of the executive branch, and employees of the U.S. Postal Service. As a result of the 1974 FLSA amendments, the minimum wage provisions of the FLSA (29 U.S.C. 206), which currently require the payment of at least $3.35 per hour to employees, were extended to almost all employees of state and local governments. Similarly, the overtime provisions of the FLSA (29 U.S.C. 207), requiring the payment of overtime at not less than a time and one-half basis for hours worked in a workweek in excess of 40, were extended to these same state and local government employees.

The 1974 amendments included a limited overtime exception for police officers, firefighters, and related employees. (29 U.S.C. 207(k)). Congress established these special provisions in recognition of the special needs of governments in the area of public safety and the unusually long hours that public safety employees must spend on duty. Section 7(k) was intended to alleviate the impact of the FLSA on the fire protection and law enforcement activities of state and local government by providing for work periods of up to 28 days (instead of the usual seven-day workweek), establishing somewhat higher ceilings on the maximum number of hours which could be worked before overtime compensation had to be paid, and providing for a gradual phase-in period. By the end of the phase-in period, the maximum number of hours for police officers and firefighters was to be the lesser of 216 or the average number of hours of work in tours of duty in work periods of 28 days as determined by DOL in a statutorily mandated study. In 1983, DOL published the final results of its study and established the new hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 Fed. Reg. 40,518).

Supreme Court

The 1966 FLSA amendments were challenged on constitutional grounds and upheld by the Supreme Court in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). The Supreme Court in *Wirtz* concluded that federal regulation of labor conditions in public schools and hospitals was constitutional under the Commerce Clause and did not unduly interfere with the performance of governmental functions entrusted to the States.

Shortly after enactment of the 1974 FLSA amendments, a number of cities and states challenged the validity of those amendments in Federal court. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court overruled *Wirtz* and held that both the 1966 and the 1974 amendments were unconstitutional to the extent that they interfered with the integral or traditional governmental functions of States and their political subdivisions. The Court reasoned in pertinent part:

> These activities [fire prevention, police protection, sanitation, public health, and parks and recreation] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

426 U.S. at 851 (footnotes and citations omitted)

Under *National League of Cities*, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation were held to be traditional functions of state and local government and, as such, exempt from the FLSA. On December 21, 1979, DOL issued final regulations defining traditional and nontraditional functions of state and local government for purposes of determining whether the FLSA was applicable. In its regulations, DOL added libraries and museums to the functions originally determined by the Supreme Court to be traditional (29 CFR 775.4). DOL defined local mass transit systems, along with seven other functions, as nontraditional (29 CFR 775.3).

A number of public transit authorities challenged the validity of the DOL determination that provision of local mass transit was a nontraditional governmental function. Ultimately, the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority* was presented with the question whether that DOL determination was a proper application of the *National League of Cities* doctrine. In 1984, following oral argument, the Court ordered reargument of the *Garcia* case on the question whether the constitutional principles established by *National League of Cities* should be reconsidered.

On February 19, 1985, the Supreme Court expressly overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985), and thereby left the FLSA fully applicable to state and local governments. Reasoning that it had "no license to employ freestanding conceptions of state sovereignty when measuring Congressional authority under the Commerce clause," the Court described its previously promulgated 'traditional governmental function' test as "doctrinally barren," and held that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the struc-

ture of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1018, 1021.

After enumerating various instances where the states "have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause," the Court observed:

> The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

105 S.Ct. at 1020.

As a result of the *Garcia* ruling, states and localities are not subject to all FLSA requirements, including the 171 and 212 maximum hours standard for law enforcement and fire protection employees respectively. On June 14, 1985, DOL announced its enforcement policy, stating that the "Wage and Hour Division will begin conducting FLSA investigations involving activities considered traditional government employment and involving employment in local mass transit systems operated by State and local governments" and "in all such cases will extend" the investigation period back to April 15, 1985. DOL selected April 15 as the effective date because that was the date on which the Supreme Court's mandate issued in the *Garcia* case. DOL also announced that it would delay its enforcement activities until October 15, 1985; this date later was extended to November 1, 1985.

NEED FOR THE BILL

In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into socially desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they

would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.

The Committee recognizes that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 7—are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet FLSA standards immediately under *Garcia*. Although many jurisdictions commendably and successfully have undertaken to do so, others have expressed an urgent need for lead-time in which to reorder their budgetary priorities while maintaining fiscal stability. As the Committee did under the 1974 amendments, it has again allowed for lead-time for state and local governments to comply with the FLSA requirements.

The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

IV. History of S. 1570

S. 1570, a bill to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, was introduced by Senator Nickles on August 1, 1985 and was referred to the Committee on Labor and Human Resources. Subsequently, Senators Nickles and Metzenbaum agreed to an amendment in the nature of a substitute for the original bill. This amendment was accepted by the Committee on Labor and Human Resources on October 8, 1985.

V. Hearings

Public hearings were conducted by the Subcommittee on Labor on July 25 and September 10 in Washington, D.C. A field hearing was held in Oklahoma City, Oklahoma on August 28. The following individuals provided testimony:

JULY 25, 1985

Senator Pete Wilson; California
Congressman John E. Porter; Illinois
Governor John D. Ashcroft; Jefferson City, Missouri
Governor Richard D. Lamm; Denver, Colorado
Governor James G. Martin; Raleigh, North Carolina
Lt. Governor William P. Hobby, Jr.; Austin, Texas
George V. Voinovich, Mayor; Cleveland, Ohio, representing National League of Cities
John E. Bourne, Jr., Mayor; North Charleston, South Carolina, representing U.S. Conference of Mayors
James C. Thomas, President-elect; representing National Association of State Personnel Executives
Senator Joseph W. Harrison, Majority Leader, Indiana Senate; representing National Conference of State Legislatures
Al Bilik, Executive Director, State and Local Division; representing AFL-CIO
Peggy Connerton, Chief Economist; representing Service Employees International Union
Harold A. Schaitberger, Legislative Director; representing International Association of Fire Fighters
Paula Mac Ilwaine, James Hankla, Abraham Aiona; representing National Association of Counties
Frank H. Forbes, Jr.; representing National Public Employer Labor Relations Association/International City Management Association
Herbert R. Hern, President; representing Industrial Employers and Distributors Association

AUGUST 28, 1985

James Hopper, staff member; representing Senator David Boren (D-OK.)
John F. Cantrell, president; representing County Officers and Deputies Association of Oklahoma
Robert H. Gardner; Tulsa Police and Fire Commissioner
Randy Orndorph, president; representing Tulsa Fraternal Order of Police
Paul Abel, Sheriff, Pottawatomie County Sheriff's Department
Ivan Simmons, president; representing Association of County Commissioners of OK.
Rhonda Couch Swagerty, Tahlequah school bus driver
Steven A. Lewis, director, Oklahoma Department of Wildlife Conservation
Captain Larry Owen, administrative assistant to Commissioner Reed; representing Oklahoma Department of Public Safety
Steve Cain, treasurer; representing Fraternal Order of Police, Oklahoma City
Thomas A. Riddle, business agent; representing Professional Fire Fighters of OK.
Carl Weinaug, city manager of Stillwater, OK.
G. Craig Weinaug, city manager of Ardmore, OK.
Robert D. Allen, Oklahoma City Municipal Counselor

Roger F. Cutler, city attorney of Salt Lake City, Utah; representing National Institute of Municipal Law Officers

SEPTEMBER 10, 1985

William E. Brock, Secretary, U.S. Department of Labor

Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division; U.S. Department of Justice

Francis Flaherty, Mayor; Warwick, Rhode Island

Zoe E. Baird, Special Counsel; representing American Public Transit Association

Wayne M. Cook, General Manager, VIA Metropolitan Transit of San Antonio, Texas; representing American Public Transit Association

Elmer Dunaway, Chairman, National Labor Committee; representing Fraternal Order of Police

Edward J. Blaisie, president, Detectives Endowment Association; representing National Association of Police Organizations, Inc.

Michael D. Muth, Legislative Liaison; representing National Troopers Coalition

William C. Summers, Supervising Attorney; representing International Association of Chiefs of Police, Inc.

John B. Stewart, Jr., Chief, Hartford Fire Department; representing International Association of Fire Chiefs

James L. Roberts, Jr., Commissioner; Mississippi Department of Public Safety

Roy G. Saunders, President-elect; representing International Association of Auditorium Managers

VI. Committee Views

A. COMP TIME

A new subsection 7(o) is added to the FLSA to allow state and local government employees to be compensated for overtime hours with compensatory time off ("comp time") in lieu of monetary compensation. Hours for comp time granted in lieu of cash must be compensated at the premium rate of not less than one and one-half hours for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one-half times the regular rate of pay.

1. Agreement or understanding

The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee. The agreement or understanding need not be in writing, but a record of its existence must be kept. An employer need not adopt the same method or procedure when reaching such agreement or

understanding with different employees. The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of comp time so long as those provisions do not conflict with this subsection or the remainder of the Act.

In the case of employees who have no recognized representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding comp time in lieu of overtime pay shall be deemed to have reached an agreement or understanding with these employees as of April 15, 1986. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee employed prior to the effective date of this subsection. If, however, a regular practice of awarding comp time to employees without a recognized representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. Employers may initiate a regular practice of awarding comp time in lieu of overtime pay between the date of enactment and April 15, 1986, so long as that practice is a regular one and is not intended to avoid or undermine the provisions of this subsection.

2. Preservation, use, and cashing out

The Committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations. An employee may accrue a maximum of 480 hours of comp time. (Hours accrued prior to April 15, 1986 do not count toward this limit). The 480 hour limit represents 320 hours of actual overtime worked times the one and one-half premium rate. Once this limit is reached, an employee either must be paid in cash for some of the accrued hours or else must use some comp time before any additional overtime hours may be compensated in the form of time off. For example, if an employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue 30 hours at the premium rate. But if an employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 hours must be accrued before comp time may be used.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued comp time subject to this subsection. The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee leaves his job voluntarily (including retirement), is terminated by his employer, or dies. The rate of compensation for cashing out accrued comp time shall be the rate earned by the employee at the time the cashing out takes

place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued comp time. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of comp time, that request should be honored unless to do so would be unduly disruptive. By "unduly disruptive", the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

B. JOINT EMPLOYMENT

A new subsection 7(p) is added to the FLSA to address the area of joint employment. Under the FLSA joint employment rule, there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of his hours worked credited to one employer for purposes of determining overtime liability. The Committee preserves this FLSA protection so as to prevent such abuses as manipulation of job scheduling or rotation of workers to circumvent overtime requirements. At the same time, the Committee recognizes that there are exceptional circumstances for which special provision should be made, as discussed below.

1. Part-time employment in a different capacity

An employee of a state or local government may have the opportunity to work at his or her option on an occasional or sporadic basis in a different capacity from his or her primary employment. A city mail clerk may serve as a referee at a sports event sponsored by the same city. A county bus driver may assist in crowd control at an event such as a winter festival. The Committee does not intend to prohibit these types of practices, as they do not invite overtime abuse. Accordingly, the new subsection allows an employee to undertake such occasional and sporadic employment without regard to the Act's overtime requirements.

2. Special detail work

An employee engaged in public safety is at times offered opportunities to accept optional special detail work for a separate and independent employer on the employee's off-duty time. These special details include the police officer who accepts extra employment from a school board to direct traffic at a football game, or from a

promoter to furnish crowd control at a rock concert or convention. Such opportunities may result from a local legal requirement promulgated by the governing body which is also the employee's primary employer. The requirement may specify that a separate and independent employer must hire sworn law enforcement personnel for these functions, pay such personnel through the primary employer's payroll system, or otherwise adjust or alter their ordinary working conditions. Under current FLSA regulations, the "joint employment" rule requires that the hours worked for the separate and independent employer be combined with the hours worked in the employee's primary job in the calculation of overtime. Under this subsection, the joint employment rule would not apply so long as (i) the special detail is worked solely at the employee's option; (ii) the two employers are in fact separate and independent; and (iii) the primary employer requires, facilitates or affects the peformance of the work, as set forth in subsection 7(p)(2)(B). For example, a school system's employment of police officers to direct traffic at a football game where local ordinance requires that only sworn police officers be used for such duty and where the work is solely at the option of the police officers would qualify for separate treatment under this exception to the FLSA. By contrast, the assignment of special details of police officers to cover the extra load of police work required by a large convention where that assignment is not solely at the option of these officers would not qualify. This would be true even if the body holding the convention reimburses the primary employer for the costs of these services.

3. Substitute work hours

Employees engaged in fire protection or law enforcement activities traditionally have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee. Current FLSA regulations may raise questions as to the propriety of such a practice. This new subsection would allow one employee in fire protection or law enforcement to substitute and work for another such employee if the substitution was (i) voluntarily undertaken and agreed to by the employees not at the employer's behest, and (ii) approved by the employer. If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule.

EMPLOYEES OF STATE AND LOCAL LEGISLATIVE BODIES

The exemption from the FLSA overtime provisions for employees of a state or local legislative body (section 3(E)(2)(C)(V) is intended to exempt these employees to the same extent as employees of Congress are exempted under section 3(e)(2)(A). Therefore, just as employees of the Library of Congress are not exempt from these provisions, neither are employees of a state or local legislative library. Existing law provides a series of exemptions for state and local legislative employees, but questions have been raised as to whether these exemptions are as broad as the Congressional exemption. The purpose of the new provision is to clarify that this now is the case. The provision is not intended to exempt from FLSA overtime cov-

erage employees of school districts or institutions of higher education.

DISCRIMINATION

Although the Act's overtime protections (including the new provisions described above) do not become effective for most state and local employees until April 15, 1986, many such employees asserted a claim to coverage under section 7 of the FLSA on or after February 19, 1985, the date of the *Garcia* decision. The Committee emphasizes that any action taken by public employers to discharge or in any other manner discriminate against employees because they have asserted such a claim is unlawful under section 15(a)(3) of the Act.

VOLUNTEER SERVICES

A new paragraph 3(e)(4) is added to the FLSA to make clear that persons performing volunteer services for state and local governments should not be regarded as "employees" under the statute. The Committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes. At the same time, the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to "volunteer."

To this end, the paragraph provides that an individual who performs services on a volunteer basis for a state or local government shall not be deemed an employee for FLSA purposes: even if the individual receives expenses, a nominal fee or reasonable benefits to perform the services. Thus, for example, a volunteer school crossing guard does not become an "employee" because he or she receives a uniform allowance and/or travel expenses. The one exception to this rule is that an individual who is employed by one public agency may not volunteer to provide the same type of services for the same public agency. To illustrate, a nurse employed by a state hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however perform such services as a volunteer at a county clinic.

The new paragraph further provides that a state or local government employee may perform volunteer services for another public agency without regard to FLSA overtime requirements, even if the two governmental entities have entered into a mutual aid agreement. Thus, where Town A and Town B have entered into a mutual aid agreement, a firefighter employed by Town A who also is a volunteer firefighter for Town B will not have his or her hours of service for Town B count as part of his or her employment with Town A.

The DOL is directed to issue regulations providing further guidance in this area. If, prior to April 15, 1986, a state or local government had a practice of treating certain individuals who performed services as volunteers, these individuals shall be consider volunteers rather than employees until April 15, 1986, for purposes of the FLSA.

EFFECTIVE DATE

The provision reaffirming the prohibition of discrimination against employees who have asserted a claim to coverage takes effect upon enactment. The amendments to section 7 (comp time and joint employment) and section 3 (volunteers and employees of state and local legislative bodies) take effect April 15, 1986 (except that DOL is to promulgate applicable regulations prior to that date). State and local government employers who are engaged in traditional functions as described by DOL at 29 CFR 775.2 and 775.4 (schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation, libraries, museums) are therefore exempt from FLSA overtime liability until April 15, 1986. The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities. Further, because many local governments begin their fiscal years in July, the amendments allow actual payment of overtime compensation to be delayed until August 1, 1986 without penalty. Liability, however, in all instances will commence on April 15, 1986. The comp time provisions described above also become applicable to existing collective bargaining agreements on that date.

The April 1986 effective date is not intended to encourage public employers to postpone their efforts to comply with FLSA overtime provisions. To the contrary, the Committee lauds those jurisdictions that have taken—and continue to take—positive action to accord employees overtime protection consistent with the FLSA.

Finally, these amendments do not affect whether employees of state and local governments who are engaged in nontraditional functions as defined by the DOL at 29 CFR 775.3—notably local mass transit systems—are covered by the FLSA prior to April 15, 1986. The Committee is aware that the question whether transit employees, prior to the decision in *Garcia*, were entitled to FLSA compensation for overtime hours worked is still being litigated in federal court. The amendments are intended to protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.

VII. Cost Estimates

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 15, 1985.

Hon. Orrin G. Hatch,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1570, the Fair Labor Standards Public Employee Overtime Compensation Act, as ordered reported by the Senate Committee on Labor and Human Resources, October 9, 1985. We estimate that this bill would have no cost to the federal government, and would result in significant savings for state and local governments.

S. 1570 would amend the Fair Labor Standards Act (FLSA) as it now applies to nonfederal units of government. The bill would allow states and localities to grant employees one and one-half hours of compensatory time off for every hour of overtime worked, in lieu of paying cash premiums for overtime, but would require that employees receive cash compensation for overtime after accumulating 480 hours of compensatory time. Jurisdictions that maintain collective bargaining relationships would be allowed to preserve contract provisions that provide compensatory time for overtime. Public employees would be allowed to use accrued compensatory time within a reasonable amount of time.

S. 1570 would further amend the FLSA to exclude from the calculation of overtime occasional part-time or volunteer work by public employees for different agencies within the same jurisdiction or for a different jurisdiction. Persons working for nonfederal units of government on a voluntary basis and all persons employed by state and local legislative bodies, except employees subject to civil service laws and library personnel, would be exempt from coverage under the FLSA.

Finally, S. 1570 would set April 15, 1986 as the compliance date for applying the FLSA to state and local employees and would allow public employers to delay payments for overtime until August 1, 1986. Any FLSA liability that may exist prior to April 15, 1986 would be eliminated.

CBO estimates that no cost to the federal government would result from enactment of this legislation, because it would not significantly affect the amount of Department of Labor activity in enforcing the FLSA. CBO estimates, however, that S. 1570 would significantly reduce the budget impact of extending the FLSA to state and local governments, as would be required under the recent Supreme Court decision in the case of *Garcia* v. *San Antonio Metropolitan Transit Authority* (105 S. Ct. 1005, 1985).

CBO has not completed its study of the potential impact of the *Garcia* decision on state and local government budgets. Our preliminary analysis, based on information from over 30 states, communities, and concerned organizations, indicates that full application of the FLSA wage and ovetime provisions as required by that decision would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide. Such costs would result from compliance with the overtime payment standards and would decrease in subsequent years as public employers renegotiate union contracts and adjust work schedules. This estimate does not include one-time costs that would be incurred to pay for compensatory time accrued after February 15, 1985.

We estimate that the bill would save most of these compliance costs, by delaying compliance with FLSA standards until April 1986, eliminating retroactive liability, and restoring the option of using compensatory time off rather than cash payments for overtime. The costs associated with the *Garcia* decision and the savings resulting from this bill are difficult to estimate with precision because of the scarcity of information regarding a number of key factors. For example, the savings depend greatly on the extent to which public employers are already complying with FLSA standards, and on the extend to which states or communities that are

not yet complying might change certain management and scheduling practices in order to reduce overtime hours. However, detailed data on the number of employees who would be affected, the number of overtime hours worked by affected employees, the number of public employees already paid premium wages for overtime, and the extent to which state and local governments could find ways to adjust work patterns and wages to avoid incurring additional personnel costs are not available on a comprehensive and reliable basis. In addition, the budgetary cost of compensatory time is uncertain, because it would depend on the extent to which government agencies would need to replace employees to maintain a full staffing level. This factor and other personnel and compensation practices vary sharply from community to community, making it difficult to reliably estimate nationwide costs.

We are continuing to collect information on this subject, and will be pleased to provide the Committee with further information as it becomes available.

With best wishes,

Sincerely,

ERIC HANUSHEK
(For Rudolph G. Penner, Director).

VIII. REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1570 is made.

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 1570 provides rules for compensatory time off in lieu of overtime compensation for certain public agency employees. All such employers and employees are currently covered by the FLSA. According to the U.S. Census Bureau, as of September 1984, there were approximately 13.5 million state and local employees. Of these, the Employment Standards Administration of the U.S. Department of Labor estimates that as of February 19, 1985, the date of the *Garcia* decision, 6.76 million of these state and local employees are subject to the overtime provisions of the FLSA.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The exact economic impact associated with this bill is not known. The legislation allows a public agency to give compensatory time off in lieu of overtime pay. If the public agency grants the time off, no additional costs are associated with the bill. On the other hand, if an employee cashes out his or her accrued overtime at termination, the rate of pay at the time of the cash-out is used rather than the rate of pay at the time the overtime is accrued. Thus, if an employee's rate of pay increases over this period of time, the cash-out will cost the employer more than if the money had been paid immediately. The Committee cannot estimate how the new flexibility

given to public agencies will be used and thus cannot determine the exact economic impact.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

This legislation has no impact on personal privacy. Certain record-keeping requirements to calculate overtime hours already are required by FLSA. The changes made by this bill do not have any additional personal privacy implications.

D. ADDITIONAL PAPERWORK, TIME AND COSTS

FLSA requires that overtime must be paid as soon after the regular pay period, normally a seven day period, as is practical. The bill allows, under certain circumstances, for some overtime hours, up to a maximum of 480, to be carried forward without regard to the regular pay period. Thus, some overtime hours will remain on an employer's books for a longer period of time than now is the case. The additional paperwork, time and costs resulting from this longer carry-over period, however, are estimated to be minimal.

IX. Tabulation of Votes Cast in Committee

The motion favorably to report the bill as amended to the Senate was passed unanimously by the Committee.

X. Section-by-Section Analysis

Section 2 adds a new subsection 7(o) to the Fair Labor Standards Act. New section 7(o)(1) provides that employees of a state or local government may receive comp time in lieu of overtime pursuant to a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees or pursuant to a agreement or understanding between the employer and employee before the performance of the work.

New section 7(o)(2) provides that for employees hired prior to April 15, 1986, a regular practice of providing comp time in lieu of overtime that is in effect on April 15, 1986 shall constitute such agreement or understanding.

New section 7(o)(3) states that comp time taken during any work week or period shall not be counted as hours worked during that work week or period.

New section 7(o)(4) provides that overtime compensation in the form of comp time may not be accrued by any employee in excess of 480 hours for hours worked after April 15, 1986. If the accrued hours do exceed 480 hours, or if the employee terminates employment, such employee must receive overtime compensation in accordance with section 7(a) of the FLSA. Further, an employee who has accrued comp time and requested its use shall be permitted such use within a reasonable period of time as long as such use does not unduly disrupt the public agency's operations. Finally, if an employee receives cash for any accrued comp time, the hourly rate for the determination of the amount of cash to be received shall be the hourly rate such employer is receiving on the date of the cash-out.

Section 3 adds a new section 7(p) to the FLSA. An exclusion from the hours worked by an employee is provided for three circumstances, each of which requires that the hours worked are solely at the employee's option. The first is for occasional or sporadic part

time work for a public agency in a different capacity from the capacity in which the employee is primarily employed. Second, an employee engaged in fire protection or law enforcement activities may work on a special detail for a separate and independent employer without having such hours count toward overtime if certain conditions are met. Finally, employees engaged in fire protection or law enforcement activities may trade hours, if such employees agree and the employer approves.

Section 4 amends section 3(e) of the FLSA by adding a new paragraph (4) which excludes from the definition of the term "employee" any individual who is a volunteer for a public agency even if such individual is paid expenses, reasonable benefits, or a nominal fee, unless such individual is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services. Further, the hours in which an employee of a public agency performs services on volunteer basis for a public agency other than the employee's employer shall not be considered as hours worked for FLSA purposes even if the employing public agency has an agreement for mutual aid with the agency for which the employee volunteers.

Section 5 amends section 3(e)(2)(C)(ii) of the FLSA and excludes from FLSA coverage an employee of the legislative branch or body of a state, political subdivision or agency, as long as such individual is not employed by the legislative library of such state, political subdivision, or agency.

Section 6 provides, that notwithstanding section 8, any employee of a public agency who asserts rights under the FLSA between February 19, 1985 and April 14, 1986 shall be accorded the same protections otherwise available under section 15(a)(3) of the FLSA.

Section 7 directs the Secretary of Labor, by March 15, 1986, to promulgate regulations on the new "volunteer" language added by section 4. Prior to such date, the practice of a public agency with respect to the definition of "volunteers" shall be controlling.

Section 8 contains the effective dates. The general rule in section 8(a) is that the effective date is April 15, 1986. Section 8(b)(1)(A) provides that there is no liability under section 16 of the FLSA for any violations arising under sections 7 or 11(c) of the FLSA occurring prior to April 15, 1986 for any employee of a public agency who would not have been covered by the FLSA under the special enforcement policy of the Secretary of Labor concerning States and political subdivisions on January 14, 1986. Section 8(b)(1)(B) provides that certain public agencies may defer payment of overtime compensation until August 1, 1986 for overtime hours worked after April 14, 1986.

Section 8(b)(2) provides that this Act and the amendments made by this Act shall not affect whether a public agency is liable under section 16 for a violation of section 6, 7, or 11 of the FLSA occurring prior to April 15, 1986 with respect to any employee of such public agency who would have been covered by the FLSA under the special enforcement policy of the Secretary of Labor concerning states and political subdivisions on January 1, 1985.

Section 8(b)(3) provides that the amendments contained in section 2 shall apply to any collective bargaining agreement, memorandum of understanding, or other agreement between the public

agency and recognized representative of such employees in effect on the date of enactment.

Section 8(c) provides that sections 6 and 7 shall take effect on the date of enactment.

XI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

Fair Labor Standards Act of 1938

AN ACT To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

Sec. 2. * * *

DEFINITIONS

Sec. 3. As used in this Act—

(a)–(d) * * *

(e)(1) Except as provided in [paragraphs (2) and (3)] *paragraphs (2), (3), and (4),* the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, [or]

(IV) [who] is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office [.], *or*

(V) is an employee of the legislative branch or legislative body of a State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (n), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who is a volunteer for a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, even if the individual is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, except that an individual who is otherwise employed by the same public agency for which the individual volunteered to perform the same type of services is not a volunteer for the purpose of this paragraph.

(B) The hours in which an employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency performs services on a volunteer basis for a public agency, other than the public agency which is the employee's employer, shall not be considered hours worked for the principal public agency for purposes of sections 6, 7, and 11 of this Act, even if the principal public agency has an agreement for mutual aid with the agency for which the employee volunteers.

SECS. 5–6. * * *

MAXIMUM HOURS

SEC. 7.

(a)–(n) * * *

(o)(1) Employees of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency may receive overtime compensation in the form of compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by subsection (a) of this section pursuant to—

(A) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representative of such employees; or

(B) in the case of employees not covered by clause (A), an agreement or understanding arrived at between the employer and employee before the performance of the work.

(2) In the case of employees described in clause (B) of paragraph (1) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (B).

(3) In determining eligibility for overtime compensation under this section, compensatory time off taken during any workweek or work period shall not be counted as hours worked during that workweek or work period.

(4)(A) No overtime compensation in the form of compensatory time off may be accrued by any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency, in excess of 480 hours for hours worked after April 15, 1986.

(B) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, receive overtime compensation in accordance with subsection (a) of this section.

(C) If any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency terminates employment with a particular public agency, the employee shall receive overtime compensation in accordance with the provisions of subsection (a) of this section.

(D) Any employee of a public agency that is a State, a political subdivision of a State, or an interstate governmental agency who—

(i) has accrued compensatory time off, and

(ii) has requested the use of such compensatory time off,

(shall be permitted to use such compensatory time off within a reasonable period after the request, if the use of such compensatory time does not unduly disrupt the operations of the public agency.

(E) In making a determination under subparagraph (B) or (C) of this paragraph, the rate of compensation of the employee shall be the rate of compensation earned by the employee at the time the employee receives compensation for overtime.

(p) In determining the hours of employment to which the rate prescribed by subsection (a) of this section applies, the hours worked by an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may be excluded by the agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section if—

(1) the hours worked are solely at the employee's option; and

(2) the hours are worked—

(A) on an occasional or sporadic part-time basis for such public agency in a different capacity from the capacity in which the employee is primarily employed;

(B) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), on a special detail for a separate and independent employer, if the public agency by whom the employee is employed requires that its fire protection or law enforcement personnel be hired by the separate and independent employer for the work, otherwise facilitates the employment, or affects the conditions of employment of employees of the separate and independent employer; or

(C) by any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), for another employee who was scheduled to work such hours if the employees have agreed, with the approval of the employer, to substitute scheduled work hours.

SECS. 8–19 * * *

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